

April 10, 2002

VIA ELECTRONIC FILING

William F. Caton, Acting Secretary
Federal Communications Commission
455 12th Street
Washington, DC 20554

Re: ***Ex Parte* Presentation**
Delay of Auctions 31 and 44 Scheduled for June 19, 2002
WT Docket No. 99-168, GN Docket No. 01-74

Dear Mr. Caton:

Cingular Wireless LLC ("Cingular") submits this written *ex parte* in support of the recent request of the Cellular Telecommunications & Internet Association ("CTIA") to postpone the above-referenced auctions in the 700 MHz band, currently scheduled to commence June 19, 2002.¹ Cingular agrees that it is in the public interest to postpone the auctions in order to satisfy the overriding goals of Section 309(j) of the Communications Act.

Pursuant to Section 309(j), the Commission has a statutory mandate to design auction rules and procedures that "manage the radio spectrum effectively and efficiently in the public interest."² That mandate also requires the Commission to "ensure that, in the scheduling of any competitive bidding . . . an adequate period is allowed . . . to ensure that interested parties have sufficient time to develop business plans, assess market conditions, and evaluate the availability of equipment for the relevant services."³ The purpose of these provisions is to make sure that spectrum is put to its highest and best use.⁴

It is not possible to fulfill these goals at this time and conduct viable auctions. As described below, holding the 700 MHz auctions as scheduled will not ensure the best use of the spectrum in the public interest, nor will it allow interested bidders adequate time to develop business plans, formulate strategies, and assess market conditions given the current uncertainties present in the market. The auctions should therefore be delayed.

¹ See *Ex Parte* Letter from Thomas E. Wheeler, President, CTIA to Michael K. Powell, Chairman, FCC in WT Docket No. 99-168 & GN Docket No. 01-74 (Apr. 3, 2002) ("CTIA Request"). Pursuant to Section 1.1206(b)(1) of the Commission's rules, a copy of this written *ex parte* presentation is being submitted electronically.

² *Delay of the Auction of Licenses in the 747-762 and 777-792 MHz Bands Scheduled for September 6, 2000 (Auction No. 31)*, Memorandum Opinion and Order, 15 F.C.C.R. 17406, ¶ 6 (2000) ("Upper 700 MHz Delay Order") (citing 47 U.S.C. § 309(j)(3), (4)).

³ 47 U.S.C. § 309(j)(3)(E)(ii).

⁴ See H.R. Conf. Rep. No. 105-217 at 153 (July 21, 1997); see also *Licenses of 21st Century Telesis, Inc. for Facilities in the Broadband Personal Communications Services*, Memorandum Opinion and Order, 15 F.C.C.R. 25113, ¶ 22 (2000).

Public Safety Considerations. CTIA notes that the Bush Administration is searching for solutions to Homeland Security spectrum needs for national security and public safety. At the same time, the FCC has commenced a rulemaking proceeding to examine ways to alleviate interference to public safety communications in the 800 MHz bands.⁵ The 700 MHz band could offer potential solutions to these important public safety issues. For example, by relocating existing 800 MHz public safety operations to 700 MHz spectrum, interference issues would be resolved and net public safety spectrum allocations would be increased. The relocation could be funded through the auctioning of vacated 800 MHz spectrum. Given that the Commission has previously stated that “[e]nsuring that adequate spectrum is available to meet the present and future need of the public safety community is one of the Commission’s highest priorities,”⁶ delay of the 700 MHz auction is warranted to allow these issues to be fully addressed in the pending public safety rulemaking.⁷

Uncertain 700 MHz Spectrum Rights. As CTIA recognizes, the 700 MHz bands are heavily encumbered and the path to clearing is far from clear, which makes bidder planning unusually complex. Incumbent broadcast TV stations in the 700 MHz bands do not have to vacate their existing frequencies until 2006 at the earliest, and could occupy the spectrum even longer if certain criteria are not met, *e.g.*, if 85 percent digital penetration rates are not achieved in individual markets.⁸ The Commission rejected imposing mandatory relocation requirements, and therefore relocation of incumbents is subject only to voluntary negotiation.⁹ As a result, if the auctions were to go forward, potential bidders would be forced to bid on wholly contingent spectrum rights that would not ripen for years, tying up their capital and credit. At the same time, carriers would have to anticipate spectrum needs adequate to meet consumer demands in the distant future. Members of Congress have previously supported a delay of the upper 700 MHz auction based upon the recognition that it does not make sense to auction spectrum that may not be available for use for many years.¹⁰ This continues to be the case.

Auction 35 Spectrum Uncertainties. An assessment of carrier spectrum needs also remains difficult given the continued uncertainty surrounding Auction 35. As the Commission is well aware, CMRS carriers have pledged more than \$16 billion for spectrum licenses in that auction to manage increasing capacity demands and to help support the

⁵ See *Improving Public Safety Communications in the 800 MHz Band*, WT Docket No. 02-55, *Notice of Proposed Rulemaking*, FCC 02-81 (rel. Mar. 15, 2002) (“*Public Safety Notice*”).

⁶ *1998 Biennial Regulatory Review*, 47 C.F.R. Part 90, *Private Land Mobile Radio Services*, WT Docket No. 98-182, *Report and Order and Further Notice of Proposed Rule Making*, 15 F.C.C.R. 16673, ¶ 20 (2000).

⁷ Comments in response to the *Public Safety Notice* are currently due May 6, 2002, and reply comments are due June 4, 2002.

⁸ See 47 U.S.C. § 309(j)(14).

⁹ See *Service Rules for the 746-764 and 776-794 MHz Bands*, WT Docket No. 99-168, *Order on Reconsideration of Third Report and Order*, 16 F.C.C.R. 21633, ¶ 34 (2001). The Administration has proposed legislation that would provide for the involuntary relocation of an incumbent broadcaster after 2006 if it has received an assigned channel for relocation. See CTIA Request at 4.

¹⁰ See *House Telecom Members Pressure FCC to Delay 700 MHz Auction Despite Deadline*, 140-A-48 (Jul. 20, 2000).

development and deployment of advanced wireless services. Despite the fact that the auction concluded more than one year ago, the spectrum has been tied up in litigation that, as the result of the Supreme Court's recent decision to grant certiorari in the matter, may now continue for several years.¹¹ The Commission has previously recognized that it did not make sense to go through with the upper 700 MHz auction until Auction 35 was complete.¹² For the same reason, the current delay sought by CTIA is warranted because the Auction 35 results have still not become final and, as a result, carrier needs for spectrum in the 700 MHz band remain extremely uncertain.

Unresolved Advanced Wireless Services Spectrum Issues. Finally, NTIA has yet to issue its plan for making spectrum available for advanced wireless services, and the Commission's advanced wireless services rulemaking remains pending. Once spectrum has been allocated, the Commission will still have to adopt service rules and complete an auction – all of which bears directly on the business plans of potential bidders for 700 MHz spectrum. As CTIA notes, this uncertainty “means that companies would not be able to assess their spectrum options effectively before having to decide on a 700 MHz auction strategy” if those auctions continue as scheduled.¹³ The Bush Administration has therefore “strongly stated its desire to delay the auction, awaiting an overall spectrum plan for advanced wireless spectrum the Commission will deliver this summer.”¹⁴ The Administration seeks to delay the upper 700 MHz band auction until 2004 and the lower 700 MHz band auction until 2006.¹⁵

Although the lower 700 MHz band is subject to a statutory requirement that receipts from the auction be deposited in the U.S. Treasury by September 30, 2002, that requirement conflicts with the Section 309(j)'s requirement to afford sufficient time to prepare for auction to ensure the highest and best use of spectrum in the public interest.¹⁶ Indeed, the Commission was faced with the same situation two years ago in connection with a statutory requirement to auction the upper 700 MHz spectrum by September 30, 2000. The Commission's resolution of that conflict should likewise govern here:

In complying with conflicting statutes, . . . we believe the Commission's primary goal should be to conduct an auction that is fair, efficient, puts the spectrum to the best use, and thereby best serves the public interest. We also believe that it is of utmost importance that we allocate and assign as valuable

¹¹ See *NextWave Personal Communication, Inc. v. FCC*, 254 F.3d 130 (D.C. Cir. 2001), *cert. granted*, 122 S. Ct. 1202 (2002). At least one Commissioner has commented that depending upon how long the litigation continues, it may make sense to consider dismissing the Auction 35 results. See *Abernathy: FCC Should Consider Dismissing Re-Auction Results*, RCR Wireless News (Apr. 8, 2002).

¹² *Delay of the Auction of Licenses in the 747-762 and 777-792 MHz Bands Scheduled for September 6, 2000* (Auction No. 31), *Memorandum Opinion and Order*, 15 F.C.C.R. 17406, ¶ 10 (2000) (“*Upper 700 MHz Delay Order*”).

¹³ CTIA Request at 4.

¹⁴ CTIA Request at 1.

¹⁵ CTIA Request at 4.

¹⁶ Compare 47 U.S.C. § 309(j)(14)(C)(ii) with 47 U.S.C. § 309(j)(3)(E)(ii).

a resource as the 700 MHz spectrum in a manner that comports with the specific statutory requirements of the Communications Act governing spectrum management and spectrum auctions. Although the Commission takes congressional deadlines very seriously, . . . postponing the auction appropriately balances our responsibilities in a manner that best serves the public interest.¹⁷

Spectrum Exchange Group, LLC (“Spectrum Exchange”) opposes CTIA’s request to delay the upper 700 MHz auction,¹⁸ claiming many of the factors cited above, *e.g.*, the pendency of the advanced services proceeding and Administration proposals to delay the auctions, were known to the Commission when it scheduled the auction. Regardless, the Commission is bound by Section 309(j)’s requirement to conduct auctions in a manner ensuring the best use of scarce spectrum, and as shown above holding the 700 MHz auctions as scheduled would not serve this purpose.

Spectrum Exchange also claims that the reasons the Commission gave for previously delaying the upper 700 MHz auction no longer exist. Yet its acknowledgement that the upper 700 MHz auction was previously delayed “so that the uncertainties concerning the Auction No. 35 licenses could be resolved”¹⁹ simply reinforces that the 700 MHz auctions should not continue because, as noted above, those uncertainties remain far from resolution.

Finally, Spectrum Exchange suggests that the proposed “comprehensive” spectrum clearing plan of the Spectrum Clearing Alliance (“SCA”), of which it is a member, would make spectrum earmarked for public safety in the 700 MHz band available “years earlier” than would be the case if the upper 700 MHz auction is delayed. Spectrum clearing is voluntary, however, and there is no guarantee that SCA’s plan will be adopted by the 700 MHz auction participants.²⁰ Moreover, SCA does not represent all incumbents to be relocated,²¹ making the timing of voluntary agreements more speculative.

¹⁷ *Upper 700 MHz Delay Order* at ¶ 11. The Commission relied upon *Western Coal Traffic League v. STB*, 216 F.3d 1168 (D.C. Cir. 2000). In that case, the court explained that when faced with conflicting statutory requirements where Congress has not spoken precisely to the conflict, courts will defer to agency interpretation where reasonable. *Id.* at 1173-77 (citing *Chevron U.S.A. Inc. v. National Resources Defense Council*, 467 U.S. 837 (1984)). The court found persuasive “the numerous cases upholding agency decisions to defer actions mandated by statute [here, depositing the lower 700 MHz auction revenues by September 30, 2002] where doing so is administratively necessary in order to realize the broader goals of the same statute [here, conducting an auction that puts spectrum to its best use and thereby serves the public interest].” *Id.* at 1173.

¹⁸ See *Ex Parte* Letter from Peter Cramton, Chairman, Spectrum Exchange to Michael K. Powell, Chairman, FCC at 2-3 (Apr. 4, 2002) (Spectrum Exchange *Ex Parte*). Spectrum Exchange acknowledges “major uncertainties” exist with respect to the lower 700 MHz auction (Auction No. 44) and therefore “[p]ublic policy might be served by waiting to hold Auction No. 44.”

¹⁹ *Id.* at 2.

²⁰ See *Service Rules for the 746-764 and 776-794 MHz Bands*, WT Docket No. 99-168, *Order on Reconsideration of Third Report and Order*, 16 F.C.C.R. 21633, ¶ 34 (2001). The Commission has previously stated its intent to not take affirmative steps to facilitate the private band sharing arrangement

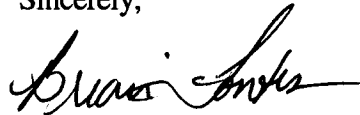
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The fact is, the greater certainty that exists with respect to 700 MHz spectrum and other spectrum being made available, the more bidders will participate at auction and the more they will be incented to quickly negotiate voluntary relocation agreements. That certainty does not exist today. Spectrum Exchange also does not address the importance of comprehensive spectrum planning for public safety spectrum as a whole, rather than proceeding on an *ad hoc* basis.

For all these reasons discussed above, Cingular supports CTIA's request and respectfully urges the Commission to postpone the 700 MHz auctions.

Sincerely,



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proposed by SCA or others, preferring instead to leave such negotiations to the market. *See id.* at ¶ 24. Lowell W. Paxon of Paxon Communications Corporation, the leader of SCA, has threatened that SCA might dissolve if the upper 700 MHz auction is further delayed, in which case he claims "there would be no voluntary clearing of space by analog TV stations to make room for nonbroadcast users." *See Comm Daily* at 5 (Apr. 3, 2002); *see also Comm Daily* at 7 (Apr. 5, 2002).

²¹ *See id.* at n. 84.